

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers) CC Docket No. 01-338)
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996) CC Docket No. 96-98)
Deployment of Wireline Services Offering Advanced Telecommunications Capability) CC Docket No. 98-147)

**REPLY COMMENTS
OF WORLDNET TELECOMMUNICATIONS, INC.**

WorldNet Telecommunications, Inc. (“WorldNet”) hereby files these reply comments in response to the comments submitted to the Commission on December 12, 2003 by the Puerto Rico Telephone Company (“PRTC”). In short, PRTC has not represented the findings or petition of the Telecommunications Regulatory Board of Puerto Rico (“Board”) fairly or accurately. PRTC has not provided any valid basis for the FCC to deny the Board’s petition.

SUMMARY

In one of the most important and contentious proceedings in years, the Commission issued its seminal Triennial Review Order (“TRO”). Based on an appellate court directive requiring a more locally based, granular analysis, the FCC crafted a process giving state commissions a key role in that analysis. The first step in fulfilling that role was to determine whether national findings on “high cap” local switching reflected the realities of each local market and to complete that determination within ninety days.

In keeping with this plan, the Board went to work immediately, conducted a thorough review and investigation of the issue. Extensive discovery, briefing, and hearings were

conducted on an expedited basis.¹ After compiling and reviewing this extensive record, the Board ruled unequivocally that based on the Commission's own criteria, significant operational barriers exist in Puerto Rico that unquestionably justify a departure from the Commission's national findings there.²

The Board's waiver petition now under consideration includes a lengthy and detailed recitation of the specific factors and issues upon which it has based its decision. And, it has documented a fairly simple and straightforward case:

1. In the Triennial Review Order ("TRO"), the Commission found "significant nationwide deployment" of competitor switches to serve the enterprise market. In Puerto Rico, only 3% of the switches serving all markets do not belong to the ILEC, and all of those switches are owned by just one CLEC.

2. In the TRO, the Commission found that its no impairment finding could be rebutted if a state commission found that competitors face operational barriers in obtaining three things: (1) UNE loops; (2) cross connects; and (3) collocation. In Puerto Rico, PRTC has not provided a single UNE loop or cross connect. And, it only completed its first collocation about two months ago (and only then after initial collocation applications were filed over three years ago, after the filing of a competitor complaint with the Board, and with record evidence indicating that substantial problems still remain). Moreover, despite the improbability of any ILEC being able to provide these services effectively without any successful experience to date, in Puerto Rico, PRTC has a documented track record of consistent wholesale service problems that removes any doubt that it will suddenly possess the competence necessary to do so now.

¹ Notably, the record below was reviewed, and the hearing conducted, by all three members of the Board personally, as well as a hearing examiner and a technical expert specially retained to assist the Board.

² WorldNet applauds the Board for its work and determination in this matter. In WorldNet's view, the fact that the Board was the only state commission to complete its evaluation and to timely file a waiver petition in accordance with the Commission's original timetable adds significantly to the weight and urgency of its request.

Based on the record evidence before the Board, it is difficult to argue that the Board's petition presents anything other than a model case for a waiver. In opposing the Board's petition, PRTC has been forced to rely upon misinterpretations and misapplications of applicable legal standards and misrepresentations of the record and the Board's findings. In short, PRTC has identified no valid basis to deny the Board's petition in this case.

DISCUSSION

I. PRTC Misinterprets and Misapplies the Applicable Legal Standards

In its comments, PRTC argues that the Board has a "heavy burden" in obtaining the waiver that it now seeks in this proceeding.³ In contending that the Board has not met this burden, however, PRTC has misinterpreted and misapplied the actual standards that the TRO requires.

A. The TRO gave the Board the discretion to make its own findings about the markets in Puerto Rico

PRTC contends first that the Board erred because it improperly conducted a "*de novo* review of the national no impairment finding."⁴ According to PRTC, the Commission's national finding in the TRO effectively left the Board with no opportunity for rebuttal because the record before the Commission included evidence about Puerto Rico.⁵ PRTC's contention is not valid.

In the TRO, the Commission made a national finding based on a consolidated record of evidence and proposals about most, if not every, jurisdiction subject to the TRO. In doing so, the Commission did not undertake a granular, market-by-market analysis. Nor did it make any individual determinations about, Puerto Rico or any other jurisdiction. Instead, it expressly and

³ See PRTC Comments at 2-5.

⁴ See PRTC Comments at 5.

⁵ See PRTC Comments at 2-3. Notably, PRTC has cast WorldNet's advocacy to the FCC in the Triennial Review proceeding in a very misleading way. Although true that WorldNet did request an exemption for Puerto Rico from any national no impairment finding, WorldNet also asked, in the alternative, that the Commission preserve the Board's authority to challenge and/or determine the impairment question independently. That is exactly what the Commission did in the TRO.

specifically delegated those responsibilities to the bodies that were in the best position to handle them: state commissions.

In its comments, PRTC effectively ignores this background and framework. In effect, PRTC misleadingly converts the Commission's national finding into a discrete and insular review of Puerto Rico markets – a review that the Commission did not make, and a conversion that, if accepted, renders the Commission's express delegation of local review and the state commission waiver mechanism entirely meaningless. That is not a proper result, and it is an obvious distortion of the standards provided in the TRO.

B. The TRO does not require that the Board base its findings and petition on new or different evidence

PRTC also argues that the Commission's national finding controls unless the Board bases its waiver petition on evidence other than what was the record before the Commission in creating the TRO.⁶ There are two fundamental problems with PRTC's argument.

First, the argument is irrelevant. Logically, the argument only has any bearing here if the Board actually based its waiver petition only on the same evidence that was before the Commission in its national review. As documented by the Board, the Board received and considered voluminous evidence that was not presented or considered by the Commission in creating the TRO. To its credit, PRTC does not attempt to claim otherwise. To its fault, however, PRTC still nevertheless misleadingly suggests in its comments that its "same evidence" argument is somehow still a basis to reject the Board's petition.

Second, PRTC's "same evidence" argument is not valid, even if it were relevant. In the TRO, the Commission did not limit waiver petitions to only those founded on new or additional

⁶ See PRTC Comments at 3 ("a waiver could be justified only based on evidence other than that considered by the Commission") & 4 ("a waiver petition must rely on types of evidence that were not before the Commission when it made its national finding of no impairment").

evidence. Indeed, such a limitation would not make sense. As a fundamental matter, the Commission delegated local review to state commissions not just to collect and review more evidence, but to provide a more intimate, focused, and “uniquely positioned” working knowledge of local market conditions.⁷ Nothing in the TRO suggests that this local knowledge and expertise (applied to the same evidence that was before the Commission) could not be the basis for a successful and appropriate waiver. In short, PRTC’s “same evidence” argument is not only irrelevant, it is a restriction that arises solely out of the advocacy and interests of PRTC, not the TRO.

C. The TRO requires a showing of operational or economic barriers to entry, not both

PRTC also argues that the Commission should reject the Board’s petition because “the Board claimed that it was under no obligation to examine evidence regarding the economic feasibility of competitive deployment of circuit switches to serve enterprise customers.”⁸ According to PRTC, the TRO instructs that a state commission is “required” to undertake this analysis in order to obtain a waiver.⁹ Again, PRTC has misstated the requirements of the TRO.

Section 51.319(d)(3)(i) of the Commission’s rules codifies the analytical requirements for state commissions in determining whether a waiver is appropriate. According to those requirements, a state commission may obtain a waiver “if it finds that operational or economic barriers exist in that market.”¹⁰ In other words, the TRO empowered the Board to obtain a waiver if it found operational barriers, economic barriers, or both. In this case, the Board has found significant operational barriers in Puerto Rico markets. That is all that the Commission’s rules require for a successful petition. To argue otherwise, PRTC has been forced to present

⁷ See TRO at ¶ 455.
⁸ PRTC Comments at 4.
⁹ See PRTC Comments at 4-5.
¹⁰ See 47 C.F.R. § 51.319(d)(3)(i).

passages from the TRO out of context and to ignore the plain language of the Commission's rules.¹¹ There is simply no basis in the TRO for the "requirement" that PRTC is claiming here.

II. PRTC Misrepresents the Record Before the Board and the Board's Findings

In its comments, PRTC also attempts to fault the Board for offering no support, or insufficient support, for the Board's findings of fact.¹² As noted above, the Board has identified and provided manifest factual support for its conclusions. To assert otherwise, PRTC has been relegated to completely contrived and misleading representations of the record and the Board's findings.

A. The Board cited ample evidence of the disparity in the evolution of competition between Puerto Rico and other jurisdictions

PRTC claims in its comments that "the Board provides neither evidence nor persuasive argument to show why Puerto Rico is differently situated from any other part of the United States, or why competitive entry in Puerto Rico is more difficult than in similar markets throughout the country."¹³ Without any danger of overstatement, PRTC's claim is completely ridiculous.

On its face, the Board's petition is replete with references to undisputed record evidence documenting the gap between the development of competition in Puerto Rico and other United States markets. Among other things, the Board expressly cited to and relied upon the following record facts that quite plainly set Puerto Rico markets apart:

- An ILEC owning 97% of all local wireline switching facilities;
- A single facilities-based CLEC;

¹¹ See PRTC Comments at 45. In the TRO passages cited by PRTC, the language purports to impose mandatory review of economic factors. In context, however, the passages simply require review of these factors in justifying a petition based on economic barriers. The Board, however, has not sought a waiver based on economic barriers in light of the strong independent evidence of operational barriers.

¹² See PRTC Comments at 5-9.

¹³ See PRTC Comments at 5.

- Six active resellers (with two accounting for 95% of the resale market);
- Not one CLEC providing service using UNE-L;
- An ILEC with a consistent history of wholesale service problems and failures;
- An ILEC that first provided access to UNEs only two years ago (and whose systems are still not yet configured to provide required UNE OSS and billing information);
- An ILEC with no successful experience in providing collocation;
- An ILEC with no experience whatsoever in providing UNE loops or cross-connects;
- An ILEC with documented and continuing problems porting telephone numbers to its competitors; and
- An ILEC with no documented experience cooperating with competitors in obtaining and/or sharing rights-of-way for facilities deployment.¹⁴

Simply put, the Board provided obvious and ample evidence to support its ruling on the uniquely slow progress of competition in Puerto Rico. Yet, PRTC now incredibly and unequivocally claims that the Board provided absolutely nothing. Its claim is simply not true.

B. The Board’s conclusion that CLEC switch deployment in Puerto Rico is not “significant” is well founded

PRTC also contends that the Board “erroneously claims that there has not been ‘significant’ deployment of wireline switches in Puerto Rico.”¹⁵ In doing so, PRTC argues (1) that the Board’s focus on the small percentage (i.e., 3%) of switches owned by competitors in Puerto Rico is misleading, and (2) that the Board did not give enough weight to the potential

¹⁴ See Board Waiver Petition at 16-25.

¹⁵ See PRTC Comments at 7.

conversion and use of wireless switches deployed by competitors in Puerto Rico.¹⁶ Both of these claims are misplaced and overstated.

First, the Board's focus on the extremely small percentage of switches owned by competitors in Puerto Rico was entirely appropriate and supportive of its conclusion. To begin with, the Board's point was not that a particular number or percentage was determinative, only that 3% is not a number that can reasonably be classified as "significant deployment" or that is even close to comparable to the level of deployment in other jurisdictions. In addition, although the number of competitor switches is not directly correlative to the number of lines served by competitors, it is obvious overstatement to contend, as PRTC has, that there is "no relationship" whatsoever. It simply cannot be argued that the Board's reference and comparison by analogy to the Commission's findings with regard to competitor switch-based penetration into residential markets does have a degree of probative value that supports the Board's conclusion (i.e., the number of competitor switches does reflect on the potential and existing level of competitor penetration into enterprise markets). Finally, PRTC fails to counter the Board's additional reliance on the fact that the limited number of competitor switches in Puerto Rico are all owned by one competitor.¹⁷ This fact necessarily distinguishes Puerto Rico from most, if not all, United States jurisdictions, and it further supports the Board's contention that the Commission's national finding of "significant deployment" simply does not reasonably describe the state of competition in Puerto Rico. Against this backdrop, PRTC has identified little, if anything, that would justify finding that the Board's conclusion about the level of switch-based competition is "erroneous."

¹⁶ See PRTC Comments at 8 & 13-14.

¹⁷ See Board Waiver Petition at 16.

Second, with regard to the diminished value that the Board placed on one case of a Puerto Rico CLEC converting wireless switches to provide wireline services, PRTC has identified no reason to reject the Board's decision other than PRTC's disagreement with it. It was entirely reasonable for the Board to conclude that the actions of a single wireless carrier or the technical feasibility of switch conversion constitute a reliable or reasonable basis upon which to rest the future of wireline competition in Puerto Rico.¹⁸ According to the Commission, it is the Board who is in the best position to evaluate and weigh the opportunities, alternatives, and potential pitfalls inherent in Puerto Rico local markets.¹⁹ Other than disagreement, PRTC has provided no basis for the Commission to second-guess those determinations.

C. The Board relied upon obvious evidence of impairment in the availability of UNE loops and cross connects

PRTC also argues that the Board's recognition of operational impairment in Puerto Rico is not supported because "there is no evidence of impairment in providing UNE loops or cross connects."²⁰ The basis for this argument is that PRTC's complete lack of experience with regard to these activities is not a barrier because: (1) its inexperience is not its fault; (2) existing CLEC penetration into the enterprise market (through resale and UNE-P) is substantial; and (3) there is no reason to suspect that PRTC will not be able to provide these things effectively.²¹ None of these claims are valid.

First, it simply does not matter whether or not that fact PRTC's lack of experience is PRTC's fault. The inquiry before the Board was whether PRTC can provide these two things without difficulties.²² And, in conducting this inquiry, the Board found no successful past

¹⁸ See Board Waiver Petition at 17 n.23.

¹⁹ See TRO at ¶¶ 190 & 454-55.

²⁰ See PRTC Comments at 9.

²¹ See PRTC Comments at 9-10.

²² See 47 C.F.R. § 51.319(d)(3)(i)(A).

experience and a consistent PRTC track record indicating that PRTC will not be able to suddenly provide these things effectively without such experience.

Second, it also does not matter (whether true or not) that competitors have achieved substantial enterprise market penetration through resale and UNE-P. The inquiry before the Board was whether difficulties in obtaining UNE loops and cross connects created a barrier to switch-based UNE-L competition, not whether competitors are successfully competing through other means.²³ Moreover, the record before the Board showed that there is not one CLEC now providing service to enterprise customers using UNE-L.²⁴ And, notably, there is not one CLEC now providing service to enterprise customers using high-capacity UNE-P because PRTC has not yet made these circuits available to competitors despite orders that have been pending for months.²⁵ In other words, PRTC is arguing that a UNE that it has never provided in the first place is no longer necessary in Puerto Rico.

Third, it is grossly and recklessly misleading for PRTC to claim that the wholesale service problems that it has had in the past have been resolved. Despite PRTC's limited focus on past UNE-P billing problems, these problems are just one of many instance of wholesale service problems documented in the record. Moreover, with regard to UNE-P, it is untrue that all problems have been resolved or that after almost two years UNE-P is being provided without incident. Admittedly, PRTC did settle a complaint with regard to its UNE-P failures last year. The record reflects, however, that many core problems still remain, including, the lingering inability of its systems to provide actual usage billing, accurate access charge billing, or to provide ordering and preordering information to competitors on a nondiscriminatory basis. In

²³ *See id.*

²⁴ *See* Board Waiver Petition at 17.

²⁵ *See* WorldNet Comments at Exhibit A, p. 20.

short, UNE-P is not only still a problem, it is just one of a string of PRTC wholesale service problems documented in the record that PRTC otherwise ignores in its comments.

In sum, the Board has had a front row seat to the way in which PRTC has treated and provided service to its competitors for years. With this experience and the record before it, it was imminently reasonable for the Board to conclude that it could not rest the future of competition in Puerto Rico on an empty assurance of a level of PRTC performance that has never occurred in the past. PRTC has not identified anything in its comments to change this fact.

D. The Board relied upon sound evidence of impairment in the availability of collocation

PRTC also argues that the Board's recognition of operational impairment in Puerto Rico is not supported because the "Board's conclusions on collocation are erroneous and based on incomplete evidence."²⁶ The basis for this argument is that its extremely limited and problematic experience with collocation: (1) was, again, not its fault; (2) overstated by the Board; and (3) explained in PRTC evidence that the Board refused to accept. None of these claims are valid.²⁷

First, again, it does not matter whether or not PRTC's failure to provide a single collocation without substantial delay and significant problems was PRTC's fault or not. The inquiry before the Board was whether PRTC can provide collocation without difficulties.²⁸ The record showed that PRTC has not yet provided a single collocation without difficulty and that significant problems still remain in its ability to do so.

Second, it is misleading for PRTC to suggest that the Board only relied on the mere filing of a collocation complaint against PRTC. The circumstances before the Board were not just that PRTC's first and only attempt at collocation resulted in a complaint, but (1) that PRTC has an

²⁶ See PRTC Comments at 11.

²⁷ See PRTC Comments at 11-13.

²⁸ See 47 C.F.R. § 51.319(d)(3)(i)(A).

extended history of not responding to collocation applications in a timely fashion, (2) that even absent the complaint PRTC still had only completed the collocation process once (after an unduly lengthy and contentious process), and (3) that even though the complaint was settled the record showed that significant problems still remain. Moreover, PRTC's documented paucity and problematic collocation experience was underscored by the extensive track record of PRTC wholesale service problems noted earlier.

Third, it is also entirely misleading for PRTC to fault the Board in any way for refusing to accept PRTC's evidence addressing its collocation woes. To begin with, it should be noted that although PRTC heralds how the evidence would have exculpated PRTC from any fault in its collocation problems, the evidence was simply comprised of self-serving affidavits from PRTC. More importantly, however, the affidavits were submitted by PRTC in a manner that gave no other party an opportunity to respond to them. The parties in the proceeding before the Board were given the opportunity for discovery and to submit two rounds of pre-filed written testimony and exhibits. PRTC did not include its affidavits with any of them. Instead, it waited to submit the affidavits one day before the scheduled hearing in the proceeding along with its closing brief. Indeed, ironically, in its brief, PRTC argued that the Board could not (out of due process concerns) rely on any evidence to which PRTC was not provided an opportunity to respond.²⁹ And, thereafter, PRTC was given ample opportunity to defend against a motion to strike the evidence and to present its case to the Board.

The exclusion of PRTC's self-serving affidavits was the product of PRTC's own negligence. The exclusion was neither improper, nor was it remotely determinative of or critical to the Board's decision to file its petition here. In short, the Board made a procedural ruling in

²⁹ See PRTC Closing Brief at 2, n. 2 ("To the extent that the Board has additional evidence submitted by carriers that it has not released to PRT, PRT believes that as a matter of due process, the Board may not rely on this evidence to make a finding of impairment.").

accordance with basic principles of fair play, due process, and its own long-standing procedures, customs, and practices. Indeed, of all the local determinations that a national reviewing body should not now second guess, this is foremost.

PRTC has provided no reason for the Commission to question the Board's findings that PRTC collocation inexperience and difficulties is a significant operational barrier to switch-based competition in Puerto Rico.

E. The Board's consideration of PRTC problems with local number portability and inexperience in facilitating right-of-way approvals was relevant and appropriate

Finally, PRTC claims that the Board "considered factors irrelevant to the switching analysis."³⁰ In particular, PRTC maintains that the Board improperly considered documented (1) PRTC problems in providing local number portability to competitors and (2) PRTC inexperience in cooperating with competitors to obtain necessary rights-of-way approvals and authorizations for the placement of their own facilities.³¹ Neither of these criticisms is valid.

To begin with, the TRO expressly invited the Board to consider "other evidence" of operational barriers in Puerto Rico.³² That is exactly what the Board did. And, it did so with an express reference to the authority to do so in the TRO.³³

With regard to number portability, the Board accurately recognized that local number portability is a vital and necessary component of effective competitor switch deployment.³⁴ It also accurately recognized that the record included evidence of a pending complaint against PRTC alleging problems with PRTC's provision of the service.³⁵ Although PRTC now

³⁰ See PRTC Comments at 14.

³¹ See PRTC Comments at 14-15.

³² See TRO at ¶ 456.

³³ See Board Waiver Petition at 23.

³⁴ See Board Waiver Petition at 24.

³⁵ See Board Waiver Petition at 24.

disclaims that the complaint has any merit,³⁶ the complaint, whether valid or not, represents that problems exist to some degree. Moreover, PRTC provided nothing in the record to contradict that local number portability has, and continues to be, a problem for it.

Similarly, with regard to facilitating rights-of-way approval, PRTC again retreats to the same argument that its complete inexperience is not an operational barrier. Again, neither common sense nor a record replete with PRTC wholesale provisioning problems support PRTC's claim. Moreover, PRTC's claim that rights-of-way approval is not relevant to an inquiry about competitor switch deployment is obviously not correct. Rights-of-way are not just implicated in the installation of competitor loops. Switches are pieces of equipment that will necessarily occupy space, which, in some cases may not be the competitor's own. In such cases, rights-of-way most certainly become an issue. The Board, therefore, was imminently justified in including rights-of-way in its inquiry and making it one of the many bases supporting the petition for waiver that is the subject of this proceeding.

CONCLUSION

This is not a difficult case. The evolution of local competition and the implementation of the Telecommunications Act of 1996 ("Act") in Puerto Rico are far behind other jurisdictions in the United States. Where resale has almost run its course in most jurisdictions, it is still the primary source of competition in Puerto Rico and is still provided with many of the problems that most mainland jurisdictions solved long ago. The first UNE was provided in Puerto Rico

³⁶ The Commission, like the Board, should take with a large grain of salt PRTC's dismissive attitude toward the myriad of complaints and competitive issues raised against it in Puerto Rico. Smaller competitors are disproportionately burdened by the time and expense of lodging legal and regulatory complaints, given that they have enough of a challenge to raise capital, run their businesses, and compete in a very difficult telecommunications market. The general approach is to work very hard at all business levels to try and resolve the issues first. A complaint, then, is only a "last resort" for a problem of a continuing and substantial magnitude. Many problems never rise to the complaint level because it costs too much and takes too long to resolve them that way. Thus, any complaint that is filed is usually well warranted and often just the "tip of the iceberg." That PRTC often "resolves" these complaints (after significant competitor expense) under the veil of private settlements and then claim later that the whole thing was much ado about nothing, does not change these facts.

less than two years ago with provisioning and billing problems that still persist and orders for DS1 UNE-P circuits that have still not been fulfilled. And, the first collocation in Puerto Rico was completed less than two months ago after a tortured history of stops and starts that started over three years ago.

Not surprisingly, PRTC is eager to reap the benefits of the advances of its ILEC counterparts in facilitating competition elsewhere. As a practical (and now legal) matter, however, PRTC can and should now be held accountable for the meager pace and efforts with which it has determined to approach its competitive obligations under the Act. The TRO describes a competitive world that simply has not yet arrived in Puerto Rico. And, the Commission created the waiver process in the TRO for cases just like this. The Commission should grant the Board's petition for waiver.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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